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HIGH COURT OF CHHATTISGARH: BILASPUR
S.B. HON'BLE SHRI VIJAY KUMAR SHRIVASTAVA, J
MISCELLANEOUS APPEAL NO.707 OF 2005

Appellants :
Defendants

1) Palsai, S/o Sri Gyansai Gond, aged about 45 years, R/o Village Kerju, PS & Tab Sitapur, Dist Surguja (CG)

2) Anil Singh, S/o Late Prasanna Ram, Aged about 60 years, R/o Village Baneya, PS & Tah Sitapur, Dist Surguja, (CG)

3) Chhabilsai, S/o Late Prasanna Ram, Aged about 50 years, R/o Village Kerju, PS & Tah Sitapur, Dist Surguja, (CG)

4) Badsai, S/o Late Prasanna Ram, Aged about 46 years, R/o Village Farad Bahar, Tah Sitapur, Dist Surguja, (CG)

5) Chawar Sai, S/o Late Ramsai, aged about 35 years

6) Nilambar, S/o Late Ramsai, aged about 25 years

Both appellants No.5 & 6 are R/o Village Kerju, Thsil Sitapur, Distt-Surguja (CG).

Versus

Respondents :
Plaintiffs

1) Girvar, S/o Hawalsai, Aged about 50 years

2) Hirdan, S/o Hawalsai, Aged about 40 years

3) Smt Devmati, Wd/o Hawalsai (Dead)

4) Hanuman Sai, S/o Late Jagansai (Dead)

5) Shyamsunder, Aged about 65 years, S/o Late Jagansai
6) Dheersai, S/o Late Jagansai Aged about 60 years

All residents of Village Kerju, Tahsil Sitapur, Dist Surguja (CG)

Respondent
Defendant

7) State of Chhattisgarh through the Collector, Surguja (CG)

PRESENT:

Shri Manoj Paranjape, counsel for the appellants.

Shri Sanjay Patel, Counsel for respondents 1 to 6.

Shri JD Bajpai, Government Advocate for the State / respondent No.7.

ORDER

(Passed on 02.01.2006)

This appeal has been directed against the judgment and decree dated 24.01.2005 passed by the First Additional District Judge, Ambikapur, District Surguja, in Civil Appeal No.25-A/2003 whereby the judgment and decree passed by the trial Court has been set aside and the case has been remanded to the trial Court.

2) The respondents/Plaintiff filed a suit for declaration and permanent injunction, averring that, at the time of settlement the suit land was settled and recorded in the name of Jagansai, who remained in possession of the suit land till his death. After his death, respondents/plaintiffs being the heirs of Jagansai were recorded

title holders in the record of rights and are in possession of the suit land. Very often, they used to provide the suit land to the appellants for their livelihood. The appellants taking advantage of that, got their names recorded in revenue records along with the names of respondents No.1 to 6 and filed an application for partition before Tahsildar, Sitapur. Respondents/plaintiffs raised the question of title, as a result thereof, the Revenue Court stayed its proceeding and thereafter respondents/plaintiffs to establish their rights filed civil suit. The appellants/defendants denied the claim of respondents/plaintiffs. They pleaded that the suit is time barred. The suit land was joint family property. In the year 1962, a partition took place and since then they are in possession of the suit land which came in their share.

3) Both the parties adduced their evidence in support of their pleadings. Learned trial Court after evaluating the evidence, decided the issues in favour of respondents/plaintiffs but on the ground that they have not claimed possession, hence the suit is not maintainable, dismissed the same. Aggrieved with that judgment and decree, respondents/plaintiffs preferred an appeal and during the pendency of that appeal, they filed an application under Order 6 Rule 17 of the CPC for amendment, seeking possession of the suit land and also filed another application under Order 41 Rule 27 of the CPC for permission to produce some documents.

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4) Learned First Appellate Court, after hearing both the parties and taking into consideration the pleadings of both the parties, held that for deciding the amendment application it is necessary to provide opportunity to both the parties to adduce their evidence. Therefore, with various directions, remanded the suit to the trial Court. The trial Court, without affording opportunity to the parties to adduce their evidence, vide order dated 02.09.1993 decided the amendment application. By that order, learned trial Court held that the amendment application whereby restoration of possession has been sought is barred under Article 65 of the Limitation Act, therefore, dismissed the application. On the same day, learned trial Court dismissed the suit holding that the suit is time barred vide its judgment and decree dated 02.09.1993. Being aggrieved with that judgment and decree, the plaintiff / appellants filed an appeal which has been registered as Civil Appeal No.25-A/03. Learned First Additional District Judge Ambikapur after hearing both the parties held that the judgment and decree passed by the trial Court, as well the order passed by the trial Court on amendment application and on application for admission of documents is erroneous therefore, remanded the suit vide impugned judgment and decree with a direction that for consideration of amendment application both the parties should be allowed to adduce evidence and thereafter in accordance with earlier remand order the suit shall be disposed of.

5) Respondents'/plaintiffs' averment is that they are title holders and are in possession of the suit land and from time to time, they allowed the appellants to cultivate the suit land for their livelihood, whereas, the appellants' pleading is that partition took place in the year 1962 and the suit land falls in their share and since then, they are in possession of the suit land as owner thereof. The respondents/plaintiffs who have earlier not sought the relief of possession as a result of which their suit has been dismissed, have filed the instant application for amendment and according to settled law if such type of amendment is time barred, in that case the application cannot be allowed.

6) In the instant case, whether the desired amendment is time barred or not is not a matter of law alone, but also is a matter of facts. Therefore, without evidence, whether to allow or dis-allow the application could not be determined and initially 1st Appellate Court also, taking into account the said fact, remanded the case expressing its opinion for taking evidence to decide the amendment application but trial Court did not care to comply with the said order and without providing opportunity to the parties to adduce their evidence decided the amendment application and dismissed the same.

7) The judgment and decree of the trial Court is passed in violation of the earlier remand order passed by the 1st Appellate Court, therefore, vide impugned judgment and decree, learned 1st Appellate Court rightly further remanded the case to the trial Court

for deciding the applications and suit in accordance with the earlier remand order passed by the 1st Appellate Court after providing opportunity to the parties to adduce their evidence.

8) I am of the opinion that vide impugned judgment and decree, learned 1st Appellate Court has rightly passed the order remanding the case back to the trial Court, therefore, the same does not call for any interference.

9) In the result, the appeal is liable to be dismissed and it is accordingly dismissed. Consequently, M.(C.)P.No.872/05 disposed of.

Parties to bear their own costs.

Sd/-
V.K. Shrivastava
Judge

padma